Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., *et al.*,

Petitioners,

v.

BOAT OWNERS ASSOCIATION OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a boat tower be found liable for unfair competition in violation of the Lanham Act, based on a single, private radio communication with the United States Coast Guard that was not directed to, nor legally interceptable by, nor heard by, any consumer?

PARTIES TO THE PROCEEDING

The only parties to the proceeding before the Court of Appeals whose names do not appear in the caption are Glen F. Rosenberger and Richard B. Beck.

The corporate petitioners have no parents and there are no publicly held companies that own 10% or more of the stock of either corporate petitioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Regulatory Provisions Involved	1
Statement of the Case	7
A. Background of the Case.	7
Reasons for Granting the Writ	10
I. The Petition Should Be Granted Because The Court Of Appeals Has Sanctioned A Dramatic Departure From Established Precedent By Upholding A Finding Of A Lanham Violation In The Absence Of Both A Use In Commerce And Any Likelihood Of Consumer Confusion.	10

Contents

Page

A. A single radio communication directed solely to the Coast Guard is not likely to cause confusion among an appreciable number of consumers 12

B. A private radio communication directed to the Coast Guard is not a "use in commerce" 13

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Energy Four, Inc. v. Dornier Medical Systems, Inc., 765 F. Supp. 724 (N.D. Ga. 1991) 15, 16

Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538 (2d Cir. 1956) 13

Mushroom Makers, Incorporated v. R.G. Barry Corporation, 580 F.2d 44 (2d Cir. 1978) 13

Paramount Picturers Corporation v. Video Broadcasting Systems, Inc., 724 F. Supp. 808 (D. Kan. 1989) 16

Scarves by Vera, Inc. v. Todo Imports, Ltd., 544 F.2d 1167 (2d Cir. 1976) 13

The Hertz Corporation v. Avis, Inc, 725 F. Supp. 170 (S.D.N.Y. 1989) 12

Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763; 112 S. Ct. 2753; 120 L. Ed. 615 (1992) 11, 12

Valu Engineering, Inc. v. Nolu Plastics, Inc., 732 F. Supp. 1024 (N.D. Cal. 1990) 15

Cited Authorities

Page

Statutes:

15 U.S.C. § 1114(i) 14

15 U.S.C. § 1114(1) 1, 13

15 U.S.C. § 1125(a)(1)(A) 2

15 U.S.C. § 1127 .....2, 13, 14

28 U.S.C. § 1254(1) 1

47 U.S.C. § 605(a) 3, 11, 14

Other Authorities:

47 C.F.R. § 80.373 ..... 4, 14

47 C.F.R. § 80.373(f) 10, 11

47 C.F.R. § 80.89(d) 3, 11

Black's Law Dictionary, 74 (West 1968) 15

1 *McCarthy On Trademarks and Unfair Competition*, § 2:33, at 2-57-58 (West 1998) 12

Cited Authorities

Page

U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy § 3.B.5. 11

U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy, § 3.B.5.a. and c. 10, 11

U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy, § 3.B.5.i. and h. 10, 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed February 1, 1999 ..... 1a

Appendix B — Judgment Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed February 1, 1999 ..... 2a

Appendix C — Order Of The United States District Court For The Southern District Of Florida Granting Plaintiff's Motion For Summary Judgment And Striking Defendants' Response Dated And Filed December 2, 1997 ..... 4a

Appendix D — Amended Final Judgment Of The United States District Court For The Southern District Of Florida Dated March 26, 1998 And Filed March 27, 1998 ..... 14a

Petitioners, Sea Tow South Palm Beach, Inc., Sea Tow Services of the Palm Beaches, Inc., Glenn F. Rosenberger and Richard B. Beck ("Petitioners"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (No. 98-4671, February 1, 1999) is unreported (App. A), and *per curiam* affirms the judgment of the district court (95-8707-CV-KLR, December 2, 1997) (App. C) which was amended on March 27, 1998 (App. D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 1, 1999 (App. B). No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Lanham Act, 15 U.S.C. § 1114(1), provides:

> Any person who shall, without the consent of the registrant, use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution or advertising of

any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; . . .

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C. § 1125(a)(1)(A) provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, . . .

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1127, states, in pertinent part,

[f]or purposes of this Act, a mark shall be deemed to be in use in commerce . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce . . .

47 U.S.C. § 605(a) provides, in relevant part:

> . . . No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 C.F.R. § 80.89(d) provides:

> 80.89 Unauthorized transmissions.
>
> Stations must not: . . .
>
> (d) When using telephony, transmit signals or communications not addressed to a particular station or stations. . . .

47 C.F.R. § 80.373 provides:

80.373 Private communication frequencies.

This section describes the carrier frequencies assignable for ship-to-ship and ship-to-coast private communications.

. . .

(f) Frequencies in the 156-162 MHz band. The following tables describe the carrier frequencies available in the 156-162 MHz band for radiotelephone communications between ship and private coast stations. (Note: the letter "A" following the channel designator indicates simplex operation on a channel designated internationally as a duplex channel.)

Frequencies in the 156-162 MHZ band

Channel designator	Carrier frequency (MHz)		Points of communication (Intership and between coast and ship unless otherwise indicated)
	Ship Transmit	Coast Transmit	
	Port Operations		

. . .

	Noncommercial		
68 fn17	156.425	156.425	
69	156.475	156.475	
71	156.575	156.575	
7	156.625	---------	Intership only.
78A	156.925	156.925	
79A	156.975	156.975	Great Lakes only.
80A	157.025	157.025	Do.
67 fn14	156.375	---------	Intership only.
. . .			
	Liaison, U.S. Coast Guard		
22A fn11	157.100	157.100	Ship, aircraft, and coast stations of the U.S. Coast Guard and at LakeMead, Nev., ship and coast stations of the National Park Service, U.S. Department of the Interior.

fn11 The frequency 157.100 MHz in authorized for search and rescue training exercises by state or local government in conjunction with U.S. Coast Guard stations. Prior U.S. Coast Guard approval is required. Use must cease immediately on U.S. Coast Guard request.

U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy states, in relevant part:

3.B.5. Policy

3.B.5.a. Distress

Immediate response will be initiated, if feasible, to any known situation in which the mariner is in imminent danger. . . .

3.B.5.c. Guiding Principles in Non-Distress Cases

When specifically requested assistance, such as a commercial firm, marina, or friend, is not available, a request for assistance will be broadcast. If a commercial provider is available and can be on scene within a reasonable time (usually one hour or less) . . . no further action by the Coast Guard, beyond monitoring the incident, will be taken. . . .

3.B.5.i. Use of Government Frequencies

Government frequencies are reserved for authorized use by government agencies . . .

3.B.6.h. Communications Interference

If someone interferes with government communications, issue the command "CEASE TRANSMISSION." If interference continues, document the incident and process as an FCC violation.

STATEMENT OF THE CASE

The fundamental question in this case is whether a single, private, radiotelephonic communication with a governmental agency over a governmental frequency, for which interception, use or interference is statutorily prohibited, can give rise to a Lanham Act violation. Without doubt, both the letter and spirit of the Lanham Act are intended to protect consumers from promulgations that are likely to cause them to be confused about the source or origin of goods or services. Yet, where consumers have no right to listen to, rely on, or use private communications, it cannot fairly be said that such communications are actionable under that Act.

Participants in radiotelephone communications have a reasonable expectation of privacy. Indeed, while even cellular telephone communications can be intercepted by any amateur radio operator, such interception would be a direct violation of federal law. It is antithetical that where interception of a communication would be a violation of law, an illegally intercepted communication can be construed as a public advertisement. Nonetheless, this paradox is precisely at the heart of this case.

A. Background of the Case.

Respondent alleged that Petitioners engaged in trademark infringement and unfair competition, in violation of the Lanham Act, by holding themselves out to the Coast Guard, on one occasion, as being authorized to provide towing services to members of the boating public on behalf of Respondent.

The District Court granted Respondent's motion for summary judgment, holding that "The [Respondent's] mark was used in a manner that satisfies the Lanham Act's interstate commerce requirement. . . ," and that "This unauthorized use is likely to cause confusion." This holding was predicated solely upon a single, isolated incident that occurred on July 3, 1995, following radio communications between the United States Coast Guard Station in Ft. Lauderdale, Florida ("Coast Guard") and the operator of a vessel called "Mad Hatteras." This was followed by radio communications between the Coast Guard, Captain Rosenberger and a licensee of Respondent, known as Offshore Marine Towing ("OMT"), all on Channel 22A, a governmental channel relegated solely to U.S. Coast Guard liaison activities, and not authorized for public, commercial or non-commercial use.

In particular, on July 3, 1995, the Coast Guard received a radio communication from the "Mad Hatteras," seeking towing assistance. During that communication, the vessel owner stated that "we would prefer BOAT/U.S. if possible."

After speaking with the vessel operator, the Coast Guard sought a commercial tower over Channel 22A for the "Mad Hatteras." OMT responded to the Coast Guard. Captain Rosenberger also responded to the Coast Guard. Neither OMT nor Captain Rosenberger ever responded to, or spoke with, the "Mad Hatteras." The Coast Guard never invited or authorized the public to listen to or participate in any of the communications on Channel 22A.

After Captain Rosenberger advised the Coast Guard that his boat could respond to the "Mad Hatteras," OMT, recognizing that the vessel operator could not hear the

communications among Captain Rosenberger, the Coast Guard and OMT, stated to the Coast Guard, "Our understanding was that this gentleman wanted a BOAT/U.S. tower, can you please confirm that and let him know that we are the BOAT/U.S. tower?" Captain Rosenberger then stated to the Coast Guard, "Station Lauderdale, this is Sea Tow. Be advised we are a BOAT/U.S. tower." OMT then stated, "Be careful Glenn," to which Captain Rosenberger responded, "Larry, you be careful too, we have a contract to be able to do this under BOAT/U.S."

The facts are as follows: (a) there were no communications whatsoever between the distressed vessel owner and Petitioners; (b) there were no communications whatsoever between the distressed vessel owner and anyone other than the Coast Guard; (c) the only communications had by Captain Rosenberger, on behalf of Petitioners, were with the Coast Guard and OMT, neither of whom could possibly have been confused, and neither of whom is a consumer of commercial towing services; and (d) the communications had by Captain Rosenberger were not legally interceptable by, nor heard by any member of the public.

There was no participation on the part of the "Mad Hatteras" in the communications among the Coast Guard, Captain Rosenberger and OMT, nor were such communications heard aboard the "Mad Hatteras." The "Mad Hatteras" could not hear any of the communications as shown by OMT's request that the Coast Guard inform the vessel that OMT was "the Boat U.S. tower." Captain Rosenberger made no representation to the "Mad Hatteras." Captain Rosenberger was not even capable of having *any* communication with the vessel.

Moreover, the communications at issue were all transmitted via Channel 22A, rendering them communications that the public, by law, has no right to intercept, use or rely upon.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SANCTIONED A DRAMATIC DEPARTURE FROM ESTABLISHED PRECEDENT BY UPHOLDING A FINDING OF A LANHAM VIOLATION IN THE ABSENCE OF BOTH A USE IN COMMERCE AND ANY LIKELIHOOD OF CONSUMER CONFUSION.

Thousands of consumers call upon boat towing companies for assistance every year. Such calls are transmitted via VHF radio, typically by use of the public hailing and distress frequency (Channel 16). Often, the Coast Guard, which does not itself provide towing services in non-distress situations (i.e., those posing a genuine threat to life and limb, *see* U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy, § 3.B.5.a. and c.), will seek to locate the boater's choice of a private tower to provide assistance. Through that process, the boater is switched to Channel 22A, the frequency designated by law for use by the Coast Guard only, and those permitted by the Coast Guard to join. (*See* 47 C.F.R. § 80.373(f)). Thus, the communications between the Coast Guard and the boater are shielded from intrusion by the public (*See* U.S. Coast Guard Addendum to the

National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy, § 3.B.5.i. and h.)

Towers may be permitted by the Coast Guard to engage in private radio communications on Channel 22A in non-distress cases. (*See* U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy § 3.B.5.c.) When this occurs, the public is not a party to the ensuing communications and, indeed, is prohibited by statute (47 U.S.C. § 605(a)), regulation (47 C.F.R. §§ 80.89(d), 80.373(f)), and Coast Guard policy (U.S. Coast Guard Addendum to the National SAR Manual, Chapter 3, Maritime SAR Assistance Policy, General Salvage Policy, and Firefighting Activities Policy § 3.B.5.) from intercepting or interfering with such communications. When such communications are exchanged, as was the case here, the responding tower and the Coast Guard may discuss circumstances surrounding the prospective tow, including the identity and whereabouts of the boater, and whether the boater has requested the services of a particular towing company or its licensee. Such communications are exchanged under circumstances in which the tower has an expectation of privacy, and is not engaged in advertising its services to the public or in making representations for public ears or consumption.

As discussed below, to cloak such communications with prospective Lanham Act liability as a "use in commerce" which would be "likely to cause confusion" is contrary to the letter, spirit, and purpose of unfair competition law. Indeed, the prospect of consumer confusion is the "ultimate test." *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S.

763, 780; 112 S. Ct. 2753, 2763; 120 L. Ed. 615 (1992) (Stephens, J., concurring). That test simply cannot be satisfied in the case at bar.

A. A single radio communication directed solely to the Coast Guard is not likely to cause confusion among an appreciable number of consumers

The object of unfair competition law is to protect consumers from confusion as to the source or origin of goods and services.

> Confusion of the public is the essence of both trademark infringement and unfair competition. Almost all trademark disputes are between firms that use conflicting marks; the consumer is not a party to the litigation. But it is the consumer's state of mind that largely controls the result. . . . In this sense, protection of trademarks is merely a facet of consumer protection. As a result, the plaintiff in trademark litigation may accurately be characterized as the "vicarious avenger" of consumer interests.

1 *McCarthy On Trademarks and Unfair Competition*, § 2:33, at 2-57-58 (West 1998) (citations omitted). As stated in *The Hertz Corporation v. Avis, Inc*, 725 F. Supp. 170, 171 (S.D.N.Y. 1989), "Advertising . . . that fails to reach *the consuming public* [emphasis added] does not come within the purview of the Lanham Act, which is aimed primarily at *consumer* protection . . ."

This policy of *consumer* protection is not implicated by the facts presented by a circumstance, such as that

involved here, in which a tower engages in a private communication with the Coast Guard that is not directed to or intended for consumers. Here, no consumer heard, or even had a right to hear, such communication. Indeed, the law prohibits any consumer from intercepting the communication or using any information conveyed therein.

This Court should hold that this communication is not, by its very nature, likely to cause confusion among any — much less an appreciable number of — consumers, as is required under applicable precedents. *See, e.g., Scarves by Vera, Inc. v. Todo Imports, Ltd.*, 544 F.2d 1167, 1175 (2d Cir. 1976) (conduct constitutes trademark infringement if "it is likely to mislead many consumers"). As stated in *Mushroom Makers, Incorporated v. R.G. Barry Corporation*, 580 F.2d 44, 47 (2d Cir. 1978), "It is well settled that the crucial issue in an action for trademark infringement or unfair competition is whether there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." *See also Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956).

B. A private radio communication directed to the Coast Guard is not a "use in commerce"

An essential element of a claim for trademark infringement is proof that the defendant engaged in an infringing use of the plaintiff's trademark "in commerce." 15 U.S.C. § 1114(1). Pursuant to 15 U.S.C. § 1127, "[f]or purposes of this Act, a mark shall be deemed to be in use in commerce . . . (2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce . . ."

Petitioner did not use Respondent's trademarks in selling or advertising their services. Instead, Captain Rosenberger, on a single occasion, told the Coast Guard on a private, restricted, Coast Guard-regulated frequency, that Petitioners were under contract with Respondent to render towing services. These facts do not satisfy the commerce requirement of Section 1114(i). Such a statement does not constitute the display or advertising of a trademark in connection with the sale or advertising of services in commerce. Captain Rosenberger was not seeking to sell or advertise services to the Coast Guard or OMT.

While Respondent argued that the "in commerce" requirement was satisfied by Captain Rosenberger's statement to the Coast Guard because Congress has the power to regulate the "airways" and "waterways," and that Captain Rosenberger's communication was a public radio broadcast within the definition of "commerce" set forth in 15 U.S.C. § 1127, not all radio communications are "public." Indeed, Federal law protects the privacy of radio communications not intended for persons to whom they are not directed, 47 U.S.C. § 605(a), and the regulations and Coast Guard policy specifically protect VHF radio privacy. Indeed, 47 C.F.R. § 80.373, which governs all VHF marine radio frequencies, is entitled "*Private* communication frequencies." (Emphasis added.)

There was nothing "public" about Captain Rosenberger's statement to the Coast Guard. The non-public nature of that statement reflects the error in the District Court's findings and the Eleventh Circuit's affirmance. Petitioners did not use or display Respondent's trademark to sell or advertise. Rather, on a single occasion, Captain Rosenberger responded to a broadcast from the Coast Guard

concerning the "Mad Hatteras," and, after OMT stated that it was under the impression that the vessel wanted a Boat U.S. tower, told the Coast Guard that Petitioners were under contract with Respondent. That statement, while found to be incorrect, cannot be equated with advertising or selling services in commerce. Clearly, Captain Rosenberger was not engaged in "selling" Petitioners' services to the Coast Guard. Nor was Captain Rosenberger engaged in "advertising," the *sine qua non* of which is the intent to reach public consumers. "Advertise" means "[t]o give notice to, inform or notify, give *public* notice of, announce *publicly*, notice or observe. . . . It includes publication by hand bills, signs, billboards, sound tracks and radio . . . or in a newspaper, or by means of placards or other written *public* notices . . ." *Black's Law Dictionary*, at 74 (West 1968; emphasis added). Similarly, "advertisement" means "Notice given in a manner designed to attract *public* attention. . . . Information communicated to the *public*. . . ." *Id.* (Emphasis added.)

Here, Captain Rosenberger was not making a public announcement or seeking to advise, inform or notify the public of anything. He was making a private statement to the Coast Guard, a statement offered only in response to OMT's telling the Coast Guard that it was under the impression that the "Mad Hatteras" had expressed a preference for a Boat U.S. tower. This is not "advertising" and does not threaten to "deceive a substantial segment of the intended audience (potential consumers . . .) . . ." *Valu Engineering, Inc. v. Nolu Plastics, Inc.*, 732 F. Supp. 1024, 1026 (N.D. Cal. 1990). Nor does it qualify as a representation having a "material . . . effect on buying decisions... made in connection with interstate commerce." *Energy Four, Inc. v. Dornier Medical Systems, Inc.*, 765

F. Supp. 724 (N.D. Ga. 1991). *See also Paramount Picturers Corporation v. Video Broadcasting Systems, Inc.*, 724 F. Supp. 808, 814 (D. Kan. 1989) ("The Lanham Act proscribes advertisements which mislead the *public* [emphasis added] into believing that the trademark owner has sponsored, endorsed or authorized the use of the mark or that the owner is otherwise connected or affiliated with the [infringer] . . ."). Thus, it is clear that Petitioners did not use Respondent's trademark "in commerce."

CONCLUSION

This case presents a question of exceptional importance — whether a Lanham Act violation can be founded upon a single, private radio communication with a governmental agency. If the decisions below are allowed to stand, the traditional requirements under the Act — use in commerce and likelihood of confusion by consumers — will have been eliminated. By granting the petition, however, this Court can correct the Eleventh Circuit's decision, which defies clearly established precedent that the elements of commercial use and likelihood of confusion must be satisfied, and in so doing, reaffirm the importance of protection of consumers over the creation of private rights of action where there has been no wrong.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 1, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4671

D. C. Docket No. 95-8707-CV-KLR

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff-Appellee,

versus

SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(February 1, 1999)

Before EDMONDSON, COX and MARCUS, Circuit Judges.

PER CURIAM:

The district court's judgment is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4671

District Court No. 95-8707-CV

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff-Appellee,

versus

SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

Before EDMONDSON, COX and MARCUS, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

Appendix B

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT the defendants-appellants, pay to the plaintiff-appellee, the costs on appeal to be taxed by the Clerk of the Court.

Entered: February 1, 1999
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: APR 05 1999

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND STRIKING DEFENDANTS' RESPONSE DATED AND FILED DECEMBER 2, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8707-CIV-RYSKAMP

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff,

vs.

SEA TOW SOUTH PALM BEACH, INC., *et al.*,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND STRIKING DEFENDANTS' RESPONSE

THIS CAUSE came before the Court upon the plaintiff Boat Owners Association of the United States' ("Boat Owners") motion for summary judgment **[DE-36]**. The defendants Sea Tow South Palm Beach, Sea Tow Services of the Palm Beaches, Inc., Glenn F. Rosenberger, and Richard B. Beck (collectively "Sea Tow") have untimely responded. Because the Court will strike the defendants'

response, no reply is necessary. This motion is ripe for adjudication.

I. BACKGROUND

This is a suit for trademark infringement by Boat Owners against one of its former licensees, Sea Tow. Boat Owners states four counts in its complaint: (I) trademark infringement in violation of 15 U.S.C. § 1114; (II) false representation in violation of 15 U.S.C. § 1125(a); (III) dilution in violation of F.S.A. § 495.151; and, (IV) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), F.S.A. § 501.201-203. Boat Owners seeks injunctive relief, damages, and attorney's fees. In the instant motion, Boat Owners requests that the Court find the defendants liable, enter a permanent injunction against the defendants, and hold a trial on the issue of damages and attorney's fees.

Boat Owners and Sea Tow are the marine equivalent of AAA. (Compl. ¶¶ 2, 3.) Although Boat Owners and Sea Tow perform similar services — providing their members with services such as marine towing, emergency fuel delivery, and battery jump starting — the companies are organized differently. (Pl.'s Stmt. of Uncontested Facts at 3.) Boat Owners licenses companies to provide marine services to BOAT/U.S. members. These companies bill BOAT/U.S. for expenses incurred in providing services to BOAT/U.S. members (*Id.*) While Boat Owners prefers for BOAT/U.S. licensed-towers to service its members, Boat Owners will reimburse non-BOAT/U.S. towers who provide services when BOAT/U.S. towers are unavailable. By

contrast, Sea Tow pays individual towing companies on a yearly basis to tow Sea Tow's members. (*Id.* at 6.)

Boat Owners complains that Sea Tow is falsely representing itself as a BOAT/U.S. tower and is towing BOAT/U.S. members when BOAT/U.S. licensed-towers are available. On July 3, 1995, a vessel in distress requested assistance from a BOAT/U.S. towing company. A Sea Tow company which was formerly licensed by BOAT/U.S. responded to the message and falsely represented that it was a BOAT/U.S. tower. When a licensed BOAT/U.S. tower challenged Sea Tow, the latter did not respond to the distress call. (*Id.* at 6-7.) BOAT/U.S. alleges that Sea Tow has gained over $50,000 in reimbursements from Boat Owners making false representations such as the one described.

II. DISCUSSION

A. Untimely Response to Boat Owners' Motion for Summary Judgment

1. Background

Boat Owners filed its motion for summary judgment on September 12, 1997. On September 17, the Court granted Sea Tow's motion for an enlargement of time until October 6 to file its response to the motion for summary judgment. On October 3, the Court granted — over Boat Owners' objection — a second motion to enlarge time. On October 22, one day after the summary judgment response was due, the parties filed a joint motion to stay or continue the filing of the summary judgment response, the pre-trial stipulation,

and trial. Because trial was set for December 8, the Court denied the motion. On October 28, the Court set a hearing on Boat Owners' motion for summary judgment which, at the parties' request, the Court rescheduled twice. The hearing was finally held on December 1. Although Sea Tow's response to the motion for summary judgment was due on October 22, Sea Tow did not file a motion for enlargement of time. Sea Tow did not file its response until Friday, November 28, the day after Thanksgiving, and less than one business day before the Monday hearing. Although the certificate of service on the response states that it was hand-delivered to opposing counsel on Friday, opposing counsel stated at the Monday hearing that they had just received, and had not yet read, Sea Tow's response.

2. Merits

At the summary judgment hearing, Boat Owners moved to strike Sea Tow's response as untimely. Even if Boat Owners had not made this motion, the Court would strike the untimely filed response. Local Rule 7.1(a) of the Southern District of Florida establishes the time limits for filing responses to motions. Fed. R. Civ. P. 6(b) permits the Court to accept untimely filed pleadings "for cause shown" if a request for enlargement is made prior to expiration of the period originally prescribed, or upon a motion after expiration of the specified period "where the failure to act was the result of excusable neglect."

Where the adverse party is not a *pro se* litigant, a Court may — consistent with the Federal Rules of Civil Procedure — require conformity with the Local Rules. *Clinkscales v.*

Chevron U.S.A., Inc., 831 F.2d 1565, 1568 (11th Cir. 1987) (court properly struck surrebuttal summary judgment brief filed six months late). *See Howell v. Tanner*, 650 F.2d 610, 614 (5th Cir. 1981), *cert. denied*, 456 U.S. 918, 102 S.Ct. 1775, 72 L.Ed.2d 178 (1982). "Absent an affirmative showing by the non-moving party of excusable neglect . . . a court does not abuse its discretion in refusing to accept out-of-time affidavits." *Clinkscales*, 831 F.2d at 1568; *Farina v. Mission Inv. Trust*, 615 F.2d 1068, 1076 (5th Cir.1980); *Beaufort Concrete Co. v. Atlantic States Constr. Co.*, 352 F.2d 460 (5th Cir.1965), *cert. denied*, 384 U.S. 1004, 86 S.Ct. 1908, 16 L.Ed.2d 1018 (1966). The same standard applies to late pleadings.

The standard for what constitutes "excusable neglect" is more than a mere formality. "It is well established . . . that '[t]he fact that counsel has a busy practice does not establish excusable neglect under Rule 6(b)(2).' " *Clinkscales*, 831 F.2d at 1569. *See McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981), *cert. denied*, 456 U.S. 979, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982) (no "excusable neglect" for failing to timely respond to summary judgment motion when only excuse was that attorney was solo practitioner with busy schedule); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 818 (11th Cir. 1985), *cert. denied sub nom Biscayne 21 Condominium v. South Atlantic Financial Corp*, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311.; *Beaufort Concrete Co., supra* (no excusable neglect where party offered no excuse for failure to comply with time requirement).

In the instant case, Sea Tow filed no motion requesting the Court to accept its untimely response. Nor has it offered an excuse for its failure to comply with the time requirement. At oral argument, one of Sea Tow's attorneys stated that he had been busy with two trials during the last month. The Court notes that a busy schedule is not "excusable neglect." *McLaughlin, supra.* The parties may not, by stipulation, control the Court's docket to extend a trial date which has been set for over ten months. Nor may one party, after the Court vetoes the parties' attempt to control its docket, willfully ignore a response deadline without consequence. Accordingly, the Court will STRIKE FROM THE RECORD the defendants' pleadings filed on November 28, 1997. The Court will, however, consider the arguments which Sea Tow's counsel presented at the summary judgment hearing.

B. Boat Owners' Motion for Summary Judgment

Although it would be within the Court's discretion to grant Boat Owners' motion for summary judgment by default, the Court will *sua sponte* examine the motion in light of the applicable law and the arguments presented at the summary judgment hearing.

1. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of

showing, by reference to materials on record, that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). A moving party may discharge this burden by exposing an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325.

2. Merits

At the heart of Boat Owners' complaint are its claims for trademark infringement and false representation. 15 U.S.C. § 1114 imposes liability upon "any person" who "without the consent of the registrant . . . use[s] in commerce any . . . imitation of a registered mark in connection with the sale, . . . distribution, or advertising of any goods or services . . . [when] such use likely to cause confusion." The Eleventh Circuit requires a registrant to establish two elements to prevail upon a claim of trademark infringement: "(1) its mark was used in commerce by the defendant without the registrant's consent and (2) the unauthorized use was likely to cause confusion, or to cause mistake or to deceive." *Burger King Corp. v. Manson*, 710 F.2d 1480, 1491 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984). 15 U.S.C. § 1125 imposes liability upon "any person who . . . in connection with any goods or services . . . uses in commerce any word, term, name [or] symbol . . . which . . . is likely to cause confusion . . . as to the origin or sponsorship . . . in commercial advertising." The same set of facts which enables a registrant to recover under § 1114 will permit

recovery under § 1125. *Babbit Electronics, Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1181 (11th Cir. 1994).

Because Boat Owners has established each element of trademark infringement, it is entitled to judgment as a matter of law. Boat Owners is the owner of Registration No. 1,675,310. (Exh. 8 to Pl.'s Mot. for Summ. J.) This registration entitles Boat Owners to use the mark "BOAT/U.S." for, among other things, "arranging for towing reimbursement." The mark was used in a manner that satisfies the Lanham Act's interstate commerce requirement. *See Rickard v. Auto Publisher, Inc.*, 735 F.2d 450, 453 (11th Cir. 1984) (advertising that affects interstate commerce is commerce); *Babbit Electronics*, 38 F.3d at 1173 (fact that registrant used marks in interstate commerce satisfies the Lanham Act). Sea Tow used the BOAT/U.S. mark without Boat Owners' consent. (Pl.'s Stmt. of Uncontested Facts at 5, 7.) This unauthorized use is likely to cause confusion. *See id.*(likelihood of confusion exists as matter of law if defendant intended to derive benefit from plaintiff's trademark); *Burger King*, 710 F.2d at 1492 (former franchisee liable for infringement for continuing to use franchisor's trademark); *Anheuser-Busch, Inc. v. A-B Distrib., Inc.*, 910 F. Supp. 587, 594 (M.D. Fla. 1995) (falsely suggesting affiliation with trademark owner in manner likely to cause confusion constitutes infringement).

As to Count III, there is a strong likelihood of dilution under F.S.A. § 495.151. Purchasers may associate Sea Tow's towing and emergency marine services with Boat Owners' towing companies. *See Babbit*, 38 F.2d at 1182.

Appendix C

Boat Owners is entitled to summary judgment on Count IV. The FDUTPA gives a "consumer" a cause of action for damages against any violator of the Act, F.S.A. § 501.211(2), and gives any "person" a cause of action for equitable relief against a violator of the Act. F.S.A. § 501.211(1). The Court finds that, as a matter of law, Boat Owners is a competitor and not a "consumer" under the statute. *See Packaging Corp. Int'l v. Travenol Labs., Inc.*, 566 F. Supp. 1480 (S.D. Fla. 1983). *See also LJS Co. v. Marks*, 480 F. Supp. 241 (S.D. Fla. 1979). Because Boat Owners is not a "consumer," it may not recover damages. *Babbit Electronics*, 38 F.3d at 1182 n.7 (11th Cir. 1994). It may, however, seek injunctive relief and attorney's fees. *See Big Tomato v. Tasty Concepts, Inc.*, No. 97-1509, 1997 WL 523677 (S.D. Fla. Aug. 5, 1997).

III. CONCLUSION

Having considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that Clerk of the Court shall STRIKE FROM THE RECORD the defendants' pleadings filed on November 28, 1997: the memorandum of law in opposition to plaintiff's motion for partial summary judgment, the declaration of Cptn. Glenn Rosenberger, and the declaration of Cptn. Timothy Morgan. It is further

ORDERED AND ADJUDGED that Boat Owners' motion for summary judgment **[DE-36]** is GRANTED. The

Court finds Sea Tow liable on all counts of the plaintiff's complaint. It is further

ORDERED AND ADJUDGED that Sea Tow, its affiliates, and all individual defendants are permanently enjoined from making false representations such as the July 3, 1995 representation, which are likely to cause confusion among Boat Owners' members or other members of the consuming public. It is further

ORDERED AND ADJUDGED that Sea Tow shall, within thirty (30) days of receipt of this Order, file a written report with the Court which sets forth in detail the manner and form in which the defendants have complied with this Order. It is further

ORDERED AND ADJUDGED that the parties shall attend the December 3 calendar call, and shall submit a joint pretrial stipulation by December 5. The Court will try the issue of damages at trial if the parties have not amicably resolved this issue by the trial date.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 2 day of December, 1997.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

APPENDIX D — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 26, 1998 AND FILED MARCH 27, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8707-CIV-RYSKAMP

BOAT OWNERS ASSOCIATION
OF THE UNITED STATES,

Plaintiff,

vs.

SEA TOW SOUTH PALM BEACH, INC., *et al.*,

Defendants.

AMENDED FINAL JUDGMENT

THIS CAUSE came before the Court on the Plaintiff's BOAT OWNERS OF THE UNITED STATES motion for amended final judgment **[DE-91]** and after review of the Court's December 2, 1997 Order granting plaintiff's motion for summary judgment, the Court's January 15, 1998 Order denying defendant's motion for rehearing, and the Court's Final Judgment entered February 4, 1998. The plaintiffs timely filed a motion to amend judgment pursuant to Fed. R. Civ. P. 59(e). Modification of the final judgment is consistent with *United Steelworkers of America v. USX Corp.*, 966 F.2d 1394, 1399 (11th Cir. 1992) and the intent of the final judgment. Accordingly, it is

Appendix D

ORDERED AND ADJUDGED that the plaintiff's motion to amend **[DE-91]** is GRANTED as follows

1. Defendants, SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., GLENN F. ROSENBERGER, and RICHARD B. BECK are liable to the Plaintiff on all four of the counts to Plaintiff's Complaint: trademark infringement in violation of 15 U.S.C. §1114; false representation in violation of 15 U.S.C. §1125(a); dilution in violation of Fla. Stat. §495.151; and violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §501.201-203.

2. SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., their affiliates and GLENN F. ROSENBERGER and RICHARD B. BECK, are permanently enjoined from making false representations which are likely to cause confusion among the members of BOAT OWNERS ASSOCIATION OF THE UNITED STATES, or other members of the consuming public.

3. The Court makes no determination on the issues of damages and attorney's fees. The Court, however, retains jurisdiction to determine the questions of entitlement to and amount of damages and attorney's fees in connection with the violations referenced above which shall only be considered if:

(a) the injunction established in this Court's Order of December 2, 1997 and further set forth herein, is allegedly violated; and/or

(b) an appeal is filed in connection with the Order Granting Plaintiff's Motion for Summary Judgment and Striking Defendant's Response or this Final Judgment. The Court will only consider the issue of damages and attorney's fees in connection with an appellate filing upon the conclusion of such appellate proceedings.

4. Plaintiff's trademark BOAT/U.S. is valid and was infringed at least once by Defendants when Defendants represented that Defendants were *bona fide* BOAT/U.S. licensees rather than SEA TOW licensees.

5. SEA TOW SOUTH PALM BEACH, INC., SEA TOW SERVICES OF THE PALM BEACHES, INC., their affiliates and GLENN F. ROSENBERGER and RICHARD B. BECK are hereby permanently enjoined from representing to anyone calling for BOAT/U.S. marine services that said parties are BOAT/U.S. licensees, and said parties must instead represent to anyone calling for BOAT/U.S. marine services that said parties are SEA TOW licensees. Said parties are further permanently enjoined from representing to anyone calling for marine services that said parties are BOAT/U.S. licensees when said parties are not BOAT/U.S. licensees.

6. The Final Judgment entered February 4, 1998 is VACATED and replaced with this Amended Judgment.

Appendix D

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 26 day of March, 1998.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE